IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 72 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

GUJARAT GRAM GRUH NIRMAN ROAD

Versus

RATHOD DHARMBHAI KHUSHALBHAI

Appearance:

MR KH BAXI for Petitioner

MR PK JANI for Respondent No. 1

Mr.B.Y.Mankad, AGP for respondent No.2

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 08/11/96

ORAL JUDGEMENT

1. This Second Appeal is preferred by Gujarat Gram Gruh Nirman Board as well as Executive Engineer of the said Board against the judgment and decree passed in Regular Civil Appeal No.28/91 by the Ld.Second Assistant Judge, Mehsana after considering the rival contentions of the parties. By the said judgment and decree the lower

appellate court allowed the appeal and quashed and set aside the judgment and decree passed by the trial court in Regular Civil Suit No.354/85 by the Civil Judge (JD) at Mehsana.

2. The Ld.single judge while admitting the appeal on 6.4.92 formulated following substantial question of law which according to him is involved in this appeal and which si required to be decided by this court:

"Whether in the facts and circumstances of the case, the Honourable First Appellate Court has committed a substantial error of law in not deciding the question as to whether the suit is bad for want of notice under section 80 of C.P.C. as well as section 65 of GRHB Act, 1972 or not?"

3. The appellants have in the memo of Second Appeal framed following substantial questions of law:

"(1) Whether in the facts and circumstances of the case, the Honourable First Appellate Court has committed a substantial error of law in not deciding the question as to whether the suit is bad for want notice under section 80 of Civil Procedure Code as well as section 65 of GRHB Act, 1972 or not?

(2) Whether in the facts and circumstances of the case, the Hon'ble First Appellate Court has committed a substantial error of law in coming to the conclusion that the order of termination--Exh.40 is not a order of termination simpliciter or not?

(3) Whether in the facts and circumstances of the case, the Honourable First Appellate Court has committed any substantial error of law in coming to the conclusion as stated in No.(2) in absence of any evidence or material on record and basing its conclusion on mere inference?

(4) Whether in the facts and circumstances of the case, the Honourable First Appellate Court has committed any substantial error of jurisdiction

involving a substantial question of law in giving directions with regard to reinstatement and consideration for the purpose of seniority.?"

4. However, the Ld.single judge did not find any substance in the contention sought to be raised by the aforesaid substantial questions of law being Nos (2), (3) & (4).

5. At the hearing of present second appeal, Mr.K.H.Baxi, Ld.advocate appearing for the appellants submitted before the court that not only the question framed by the Ld.Single judge would arise as substantial question of law, but substantial question of being question No.(4) reproduced hereinabove would also arise in this appeal as according to him the civil court has no jurisdiction to give directions with regard to reinstatement of an employee working in a statutory public corporation. The aforesaid question of law is also permitted to be agitated before this court.

6. Before deciding aforesaid questions of law, it would be necessary to set out briefly the facts giving rise to present proceedings.

7. The respondent No.1--Rathod Dharmbhai Khushalbhai was employed by the appellant-Board as a clerk by order, dated 30.8.1983 and was entrusted the work of Recovery Assistant in the payscale of Rs.200-400. He was appointed on probation for one year and the said period of probation was extended on 6.9.84 to 31.10.1985. Before the said period of probation could expire, the present appellants served an order of termination on the plaintiff on 8.10.1984 terminating his services on the ground that his services were found to be unsatisfactory by the Board.

8. The plaintiff being aggrieved by the said order filed Regular Civil Suit No.354/85 in the court of Civil Judge (JD) Mehsana mainly contending that the order of termination was not one of termination simpliciter of a probationer on the ground that his services were unsatisfactory, but, it was, in substance, an order of dismissal from service based on misconduct for which the earlier warning was issued and letters were addressed to the plaintiff to the effect that either prosecution will be launched or appropriate action will be taken against him for misconduct referred to in such letters. It is his case that before passing such order which is in substance and for all purposes punitive in character no

departmental enquiry was held or any opportunity was provided to him to defend himself against charges of misconduct. According to him, the misconduct alleged against him in all the letters as well as in the warning issued to him was the basis on which the order was passed and the said order is required to be quashed and set aside and he was required to be reinstated with full backwages. The Ld.Civil Judge (SD) Mehsana vide judgment and decree dated 31.12.1990 dismissed the suit of the plaintiff. In the suit the issues were framed by the trial court based on the pleadings of the parties. One of such issues being issue No.3 was whether the suit was bad for want of notice under section 80 of C.P.Code. No issue was raised by the trial court as regards the restriction of the civil court to order reinstatement of an employee of statutory board in service in case the order of termination passed by the State is found to be null and void by the civil court. However, the trial court recorded the finding that the defendant-Board was successful in establishing that the impugned order was purely one of termination simpliciter of a probationer on the ground that he has not completed period of his probation satisfactorily. On the question whether the suit was bad for want of notice under section 80 the trial court recorded positive finding that under section 80 of CPC itself while entertaining the suit below order under application-Exh.7 party waived the requirement of issuance of notice under section 80 CPC and therefore the trial court rightly recorded the finding in the negative on issue No.3 namely to the effect that the suit was not bad in law for want of notice under section 80 CPC. This part of the finding of the trial court was confirmed by the lower appellate court and Mr.Baxi, Ld.advocate for appellants having gone through the provisions of section 80 CPC could not challenge the finding recorded by both the courts below.

9. Mr.K.H.Baxi, Ld.advocate for appellants, however,very vehemently urged before this court that the suit was still bad in law as statutory notice required under section 65 of Gujarat Rural Housing Board Act, 1972 was not served on the Board before filing suit. It would be noted at this stage that such a contention was not raised by the appellants in the written statement nor was any specific issue sought on such contention. Said contention was not even raised before the lower appellate court. The question as to whether notice under section 65 of said Act is issued or not is a mixed question of law and fact and had such contention been raised by the plaintiff by leading evidence that such notice was in fact issued or a particular correspondence pressed by the

plaintiff, it should not amount to such notice. Since no such question was raised at any stage of the suit in the trial court or before the appellate court, such question which is a mixed question of law and fact can not be permitted to be agitated in Second Appeal and therefore I do not find any substance in the substantial question of law raised by the learned single judge. In fact, such a question of law does not arise at all on the facts and pleadings before the lower courts and according to Mr.P.K.Jani, Ld.advocate for respondent No.1 has very vehemently urged before this court that since such a question of law is not at all involved and that the question of law framed by the learned single judge is not a substantial question of law it should not be permitted to be agitated. In fact that is the position of law under amended section 100 of C.P.C. and as per the decision of this court (Coram:S.D.Shah,J) in the case of KOLI JIVA GAGA vs KOLI RAJIV CHUGHA reported in 1996(1) GLH 721 this court is not bound to decide the question of law framed by the learned single judge allegedly involved in the second appeal if it is satisfied after hearing the respondents that such a question of law does not arise. In my opinion, the question of law which is framed by the learned single judge does not at all arise. First part of the question is absolutely free of controversy because the trial court has waived the requirement of notice under section 80 C.P.C. Second part of the question can not be permitted to be raised because neither in the written statement nor at the stage of trial such contention was raised nor such question was sought to be agitated before the lower appellate court and such a mixed question of law and fact can not be permitted to be raised as a substantial question of law by this court in second appeal.

10. Turning now to the question which is sought to be agitated for the first time before this court as regards jurisdiction of civil court to order reinstatement of an employee working under a public statutory corporation which is a "State" within the meaning of Article 12 of the Constitution of India. I have permitted Mr.Baxi to raise said issue as, according to me, as per my judgment reported in the case of Koli Jiva Gaga (supra) it is always open to the appellant to point out to the court even at the stage of final hearing of second appeal that in addition to question of law which is raised by the learned single judge of the High Court at the admission stage, other question of law is also involved, the High Court can permit raising of such substantial question of law if it is satisfied that such substantial question of law is involved. Mr.Baxi, Ld.advocate for appellants has

submitted that the civil court has no jurisdiction to order reinstatement of an employee in a civil suit even if the order of dismissal or termination is found to be illegal or null and void and that relationship of master and servant that existed between the parties is purely governed by the provisions of Specific Reliefs Act, reinstatement of an employee can not be granted by a decree with specific direction and to that effect according to him the law on the subject is well settled and the civil court therefore has no jurisdiction to order reinstatement of an employee simpliciter in service of employer under the provisions of Specific Reliefs Act, 1963. In order to make good his submission Mr.Baxi has relied upon a large number of authorities and to bring home the point that even the servants of a public statutory corporation can not be permitted to be reinstated by the civil court. In my opinion, this submission has little merit if attention of this court is drawn to the decision of the Constitutional bench of the Apex Court in the case of SUKHDEV SINGH & ORS vs BHAGATRAM SARDAR SINGH RAGHUVANSHI & ANR reported in AIR 1975 SC 1331 and to some of the observations made by His Lordship P.N.Bhagwati(as he then was) in the case of EXECUTIVE COMMITTEE OF VAISH DEGREE COLLEGE SHAMI vs LAXMI NARAIN & ORS reported in AIR 1976 SC 888. By reference to aforesaid decision, more particularly, the decision of the Apex Court in the case of reported in AIR 1975 SC 1331 SUKHDEV SINGH & ORS vs BHAGATRAM SARDAR SINGH RAGHUVANSHI it becomes clear that when the relationship of master and servant is not purely contractual employment between the private parties, but it is between a personnel/employee and Statutory Corporation having the characteristic of "State" within the meaning of Article 12 of the Constitution of India, an employee acquires the statutory status and that he can not be denied the right to serve if the order of termination is unsustainable, and if the termination is found to be bad in law, the court has the power to order reinstatement of said servant. The law on the subject is well established and reference to detailed discussion on the topic in the aforesaid judgment is not necessary. Said law is even subsequently followed by the Apex Court in the case of RAJASTHAN STATE ROAD TRANSPORT CORPORATION & ANR KRISHNA KANT reported in AIR 1995 SC 1715. In the present case it is not disputed that the appellant is a Statutory board having characteristics of "State" within the meaning of Article 12 of the Constitution of India. Therefore, its employee enjoys that status and it is not the question of master and servant relationship, but it is a question of denying that status, that too to a person who have acquired such status being employed with

the statutory corporation. In the present case the lower appellate court has found that the order passed against the respondent herein was purely punitive in the character in view of letters and warnings issued by the board to the plaintiff. Reference to such letters is to be found at Exhs.52 to 56 and if one goes through said documents there is no manner of doubt that some misconduct is attributed against the employee and that he is not only warned but is also intimated that prosecution is liable to be launched against him if such misconduct is repeated in future. In the background of this fact immediately after expiry of probation order of termination of probation simpliciter is passed . In fact foundation of order of termination is required to be seen and any motive behind passing the ordernot to be seen. Foundation of order of termination in the present case is the misconduct attributed to the employee and therefore in fact the procedure required to be followed, namely, issuing notice and affording reasonable opportunity was required to be followed which was admittedly not followed by the appellant corporation. The lower appellate court was therefore absolutely justified in passing decree of reinstatement in service. The lower appellate court was quite just and reasonable in not awarding backwages to the employee because admittedly the employee has not put any service to the Board during this period and under the principle of "no work no pay" it was just and proper to deny the benefit of backwages. In fact, backwages are not pressed by the learned advocate for plaintiff by filing cross objections in this court.

11. In view of the aforesaid, I do not find any substance in any of the substantial questions of law raised before this court by the learned advocate for the appellant. Second Appeal has therefore no merit and it is liable to be dismissed and is hereby dismissed. However, it is still open to the appellant-Board to hold departmental enquiry into the allegations levelled against the plaintiff, if law so permits and that right of the appellant-Board is not in anyway affected by the present judgment. Appellants are directed to reinstate the respondent No.1 in service on the post which he was holding with continuity of service with all other benefits except backwages within a period of two months from the date of receipt of writ of this court.

12. In the result, this second appeal fails and is dismissed. No order as to costs.

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